

ARGUMENT

1. The Commission should deny the Motion to Compel, because it was filed less than ten (10) days prior to the hearing in this matter as required by S.C. Code Reg. 103-829.

This Motion to Compel was filed on October 14, 2019. The hearing in this matter is scheduled for Monday, October 21, 2019. This filing of the Motion to Compel at this late date unfairly prejudices JDA in its response to this Motion and in its preparation for the hearing beginning on Monday. For this reason, JDA requests that the Commission deny the Motion to Compel pursuant to S.C. Code Reg. 103-829. Pursuant to S.C. Code Reg. 103-803, the 10-day requirement may be waived only upon a finding by the full Commission that a “hardship” exists and that “such waiver is not contrary to the public interest.” S.C. Code Reg. 103-803. Duke has not presented any evidence of a hardship sufficient to warrant a waiver of the 10-day rule in Regulation 103-829, and as such, the motion should be denied.

2. The Commission should deny the Motion to Compel because the documents requested are irrelevant and unduly burdensome.

The Motion to Compel seeks production of certain internal financial documents of Intervenor JDA. The Commission should deny the Motion to Compel because these financial documents have no relevance to this matter. The production of these documents would also be unnecessarily intrusive and unduly burdensome on Intervenor JDA.

In the Motion to Compel, Duke seeks the financial documents of JDA on the basis that JDA’s expert, Rebecca Chilton, has testified on the commercial reasonableness of certain terms of power purchase agreements between the utility and qualifying small power production facilities as defined in PURPA and Act 62, particularly in regards to whether such terms enable or inhibit the ability of QFs to obtain regularly available, market rate financing. By her own testimony, Ms.

Chilton relies on her own experience with financial institutions lending to renewable energy projects and not on any internal documents of JDA. When asked what assignment she was given when retained, she responded as follows:

I was asked **to draw on my experience** in the renewable energy project finance marketplace to provide an expert perspective on the commercial reasonableness of certain terms of power purchase agreements (“PPAs”) between the utility and qualifying small power production facilities as defined in PURPA and Act 62 (“QFs”), particularly in regards to whether such terms enable or inhibit the ability of QFs to obtain regularly available, market rate financing. In addition, I was asked **to draw on my experience** to support or refute contentions made in the testimony proffered on behalf of Duke as to the relative weight that PURPA and/or Act 62 give to their respective legislative goals to encourage renewable energy and how the balancing of those goals might affect terms provided by the utility in 14 PPAs for small power producer QFs.

Chilton Direct at 3:1-14 (emphasis added)(citations omitted). Ms. Chilton relied on her own specific experiences in providing her testimony:

For instance, in my nine years with two mainstream financial institutions lending more than \$750 million to utility-scale, largely QF, renewable energy projects, I never made a loan to a QF with a PPA shorter than ten years, nor do I have knowledge of any other mainstream lender who has. Unduly restrictive PPAs that for which financing is only theoretically available is not the commercially reasonable access to capital that Act 62 has set as the standard for treating small power producers on a fair and equal footing with electrical utility-owned resources.

Chilton Direct at 4:3-9. Ms. Chilton has never advised or otherwise rendered services to JDA relating to the development of solar projects and has never viewed any document internal or otherwise concerning any projects planned or developed by JDA. **In short, Ms. Chilton’s testimony and opinions are in no way based on, nor do they relate to, any information pertaining to JDA.**

Duke claims that it needs to review JDA’s internal financial documents “in an effort to better understand” Ms. Chilton’s testimony about the commercial terms that PURPA requires utilities to provide to QFs. This argument fails to recognize that a fundamental point of Ms.

Chilton's testimony is that any one QF's ability to attract financing is completely irrelevant to the question of whether the utility's proposed terms are PURPA-compliant. Further, documents related to the development of projects under the previously-approved rates and terms are irrelevant to the question of whether the current terms are reasonable.

Act 62 provides Duke with a better understanding of Ms. Chilton's reasoning, particularly with respect to longer contract terms. S.C. Code Ann. § 58-41-20(F)(2) provides the State's policy of encouraging renewable energy through considering the potential benefits of terms with longer duration:

Once an electrical utility has executed interconnection agreements and power purchase agreements with qualifying small power production facilities located in South Carolina with an aggregate nameplate capacity equal to twenty percent of the previous five-year average of the electrical utility's South Carolina retail peak load, that electrical utility shall offer to enter into fixed price power purchase agreements with small power producers for the purchase of energy and capacity at avoided cost, with the terms, conditions, rates, and terms of length for contracts as determined by the commission in a separate docket or in a proceeding conducted pursuant to subsection (A). **The commission is expressly directed to consider the potential benefits of terms with a longer duration to promote the state's policy of encouraging renewable energy.**

(emphasis added). As Ms. Chilton's testimony indicates, the ability of QFs to obtain regularly available, market rate financing would benefit from terms with longer duration. Her testimony speaks to QFs generally and is not focused specifically on JDA or any of its projects. She did not review any documents specific to JDA, and her testimony is in no way based on JDA's financial records.

Duke also relies on the troubling assertion that any party that intervenes in a Duke rate case or other proceeding under Act 62 would subject itself to disclosure of its financial or other internal documents. Such an argument attempts to subvert the required analysis of whether the documents requested are relevant to the proceeding. Requiring such production without relevance would have

an unnecessary chilling effect on a QFs' right to participate in such proceedings and would certainly not be in the public interest. As Duke itself points out, PURPA exempts QFs from regulatory oversight of the financial records that Duke seeks. Motion to Compel at 7, 8 (citing Witness Brown Rebuttal at 38 (citing North Carolina Utilities Commission Order in NCUC Docket No. E-100, Sub 148 (October 11, 2017) and 18 CFR § 292.602). Intervening in a proceeding before this Commission does not change that exemption. Act 62 and PURPA are designed to see that QFs, not just JDA, are afforded the opportunity to attract financing and it's wholly inappropriate to require an individual intervenor QF developer to open up their books just because they have taken a position that the regulated utility opposes.

CONCLUSION

For the reasons set forth above, JDA respectfully requests that this Hearing Officer deny Duke's Motion to Compel and the alternative Motion to Strike in its entirety.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Jamey Goldin

James H. Goldin (SC Bar No. 100092)
 E-Mail: jamey.goldin@nelsonmullins.com
 Weston Adams, III (SC Bar No. 64291)
 E-Mail: weston.adams@nelsonmullins.com
 Jeremy C. Hodges (SC Bar No. 71123)
 E-mail: Jeremy.hodges@nelsonmullins.com
 1320 Main Street / 17th Floor
 Post Office Box 11070 (29211-1070)
 Columbia, SC 29201
 (803) 799-2000

October 18, 2019
 Columbia, South Carolina

Counsel for Johnson Development Associates, Inc.